

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0357-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MALIK CORNELL PRIOR,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200200148

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney
By Wesley D. Jensen

Bisbee
Attorneys for Respondent

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By Anne Elsberry

Tucson
Attorneys for Petitioner

ECKERSTROM, Presiding Judge.

¶1 After a jury trial, Malik Prior was convicted of three counts of sexual assault, two counts of kidnapping, and one count of burglary. The trial court imposed aggravated, consecutive, sentences totaling sixty-nine years' imprisonment, and we affirmed the convictions and sentences on appeal. *State v. Prior*, No. 2 CA-CR 2004-0059 (memorandum decision filed June 26, 2007).

¶2 Prior sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging the trial court erred in failing to sufficiently investigate whether the jury had been tainted by any communication with a juror who was excused before deliberations.¹ The court found Prior's claim was both precluded and lacking in merit and dismissed his petition.

¶3 In his petition for review, Prior makes the same arguments that he raised below about the merits of his claim. But he does not address the court's determination that his claim is precluded pursuant to Rule 32.2(a)(3). The court's order states:

The court has conducted the review required by Rule 32.6. . . .

. . . .

[The] issue is precluded. As noted, [Prior] pursued a direct appeal. He could have raised this issue on appeal, but did not do so. . . . [The] claim of error because the trial court

¹After investigating an allegation of juror misconduct and consulting with counsel, the trial court excused a juror who had been overheard talking on a cellular telephone in a local store about her impressions of the case. The court also asked the jury panel as a group if that juror had communicated with any of them about her opinion of the case, and each juror indicated she had not. Prior argues the court erred in failing to inquire further about the excused juror's communications with other jurors and "should have, at least, voir dired each juror individually" and privately.

allegedly failed to conduct an appropriate inquiry about juror misconduct was ripe for presentation on direct appeal. In the present Rule 32 proceedings, [Prior] relies on the same record in existence at the time of the direct appeal. Because the issue could have been raised but was not, it was waived on appeal and therefore is precluded under Rule 32.2(a)(3). . . .

¶4 Pursuant to Rule 32.6(c), a court “shall order the petition dismissed” if it finds—as the trial court found in this case—that all of petitioner’s claims are procedurally precluded and “no purpose would be served by any further proceedings.” Because Prior does not challenge this independent and sufficient ground for dismissal, we need not address the court’s conclusion, in the alternative, that Prior’s claim also lacks substantive merit.

¶5 For the foregoing reason, although we grant review, we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

JOSEPH W. HOWARD, Judge